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Assurance of State Citizens 'Rights as a Legal State Pillar

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Abstract

Efforts setting human rights have become a crucial topic to the discussion of drafting the 1945 Constitution, which boiled down to the idea of entering or not entering human rights into the constitution, arguing respectively that their rules of rights in the constitution would give legal certainty on the other argument the state was bound to protect the rights of citizens. This nation later showed the country often violate the rights of citizens in the form of active measures and the form of laws and regulations that reduce rights of the citizens. On the fact that the amendment of the 1945 Constitution then enter the setting for the rights of citizens in more detail, by also providing the mechanism of “judicial review” as a means to avoid any legislation contrary to human rights.

Keywords: *Assurance; Citizens Right; legal State*

I. Introduction

One of the important changes in the 1945 Amendment (the 1945 Constitution of the Republic of Indonesia) is that the regulation of citizens' rights is more comprehensive than the 1945 constitution (pre-amendment) which regulates in general and concise terms.¹ The 1945 Constitution of the Republic of Indonesia as a manifestation of the ideals of legal and political reform after the Soeharto Government has strengthened the constitutional guarantee of citizens' rights. As a historical note, the 1949 Constitution of the United States of Indonesia (RIS Constitution)² and the Provisional Constitution of the Year 1950

¹ In the Discussion of the 1945 Constitution, there was a debate about whether the rights of citizens were included in the articles of the Constitution. In the BPUPKI Meeting there are two poles, namely Soepomo-Soekarno (refusing citizens' rights to be included in the Articles of the Constitution) and M. Yamin - M. Hatta (proposing citizens' rights to be regulated in the Articles of the Constitution). Read Saafroedin Bahar, et al (Eds), Minutes of BPUPKI-PPKI Session, May 22, 1945-22 August 1945, Jakarta: State Secretariat of the Republic of Indonesia, 1995, p. 162, 178-181, 193-300, 249-260, 263-284.

² The RIS Constitution was enacted based on RIS Decree No. 48 of 1950 concerning the promulgation of the Charter for the Signing of the Constitution of the United Republic of Indonesia and the Constitution of the United Republic of Indonesia. Indonesia, the Decree of the President of the United Republic of Indonesia regarding the Announcement of the Charter of the Signing of the Constitution of the United Republic of Indonesia and the Constitution of the Republic of Indonesia.

(UUDS 1950)³ governing the rights of citizens are quite comprehensive. The RIS Constitution regulates the Rights and Freedoms of Citizens in Chapter I of the Republic of the United States of America in Section 5 on Basic Human Rights and Freedoms Article 7- Article 33. Meanwhile, the 1950S Constitution regulates the rights and freedoms of citizens governed in Chapter I of the Republic of Indonesia. Section 5 concerning Basic Human Rights and Freedoms Article 7 - Article 34.

In the preparation of the 1945 Constitution, M. Hatta and M. Yamin proposed that citizens' rights are regulated in the body (articles) of the Constitution. The proposal was not accepted and PPPI decided to regulate the rights of citizens in general and brief. In the Preparatory Meeting for the Independence Preparatory Agency (BPUPKI), during the second session, on July 15, 1945, M. Hatta expressed his view that based on the constitution of the 1945 Constitution it was necessary to keep the state from becoming a power state.⁴ In practice, M. Hatta's concern is proven. Historical facts prove, under the 1945 Constitution, the experience of the practice of state administration during the Guided Democracy Government under President Sukarno (1959-1965) and the era of the New Order Government under President Soeharto (1966-1998) nuanced authoritarian. During the second period of the government, there was a concentration of state administration in the hands of the president. This is due to the absence of separation of state power, violations of human rights, judicial power that is not independent and corrupt as well as the law to be a legitimate tool of power for the benefit of the statute quo.

The wave of reforms in 1998 re-ignited the idea of regulating citizens' rights⁵ in the Constitution and a strong desire of the people to enjoy a democratic constitutional life based on law. The people's desire cannot be separated from the experience of state administration under President Sukarno and President Soeharto. After the 1998 reform movement, there was a movement to amend the 1945 Constitution. Amendments to the 1945 Constitution should not provide an opportunity for the emergence of state administration practices with executive power as the main pendulum (executive heavy) as happened in the past. legislative heavy).

In the context of the black throne history, the concept of a democratic rule of law needs to be used as a paradigm in the Constitution. This paradigm of a democratic rule of law is required to be placed in the provisions of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Therefore Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia NRI should be interpreted as a democratic Indonesia.

The use of the concept of a democratic rule of law is not new in the scope of the history of Indonesian constitution. Article 1 paragraph (1) of the RIS Constitution contains the term "democratic rule of law."⁶ The 1950 S Constitution also introduces the term "democratic rule of law."⁷ In the post-amendment of the 1945 Constitution the words of democratic rule of law are included in Article 28 Paragraph (5). Thus, the inclusion of the term "an independent and sovereign United Republic of Indonesia is a democratic rule of law" can be applied in the 1945 Constitution after the amendment, especially in Article 1 paragraph (3).

³The Provisional Constitution of the Republic of Indonesia 1950 was enacted pursuant to Law No.7 of 1950 concerning Amendment to the Constitution of the United States of Indonesia to become the Provisional Constitution of the Republic of Indonesia. LN RI of 1950 Number 56.

⁴ Saafroedin Bahar, et al. (Eds), *op.cit.*, p. 162. During the formulation of the 1945 Constitution, in the BPUPKI Large Meeting, M. Hatta had said that M. Hatta said that citizens' rights had to be included so that the Indonesian state to be formed did not become a power state. (p. 162). Guarantee 178-181, 193-300. Soekarno 249-260, Soepomo 263-284

⁵ Before human rights entered into the 1945 Constitution of the Republic of Indonesia, the current strengthening of the protection of human rights in Indonesia after the reform was preceded by the issuance of RI Decree No. XVII / MPR / 1998 concerning Human Rights and 1999 issued Law No. 39 of 1999 concerning Human Rights.

⁶ Article 1 paragraph (1) of the RIS Constitution reads as follows, "An independent and sovereign Republic of the United States of Indonesia is a democratic and federal state of law"

⁷ Article 1 (paragraph 1) has: "An independent and sovereign Republic of Indonesia is a democratic rule of law"

II. Research Methodology

This research was conducted using normative legal research methodology.⁸ Normative legal research starts from the understanding that legal research is done by examining library materials or mere secondary data. This research was conducted by reviewing the sources of positive law and documents related to legal education. The source of positive law can be in the form of laws and regulations at every level related to the needs of this research. This legal research is carried out by revealing systemic, methodological, and consistent truths. This legal research also sees harmony between legal norms and reality.

In the normative legal research, library materials are basic data which in research science are classified as secondary data. This secondary data has a very broad scope, which includes government-issued documents, court decisions, laws and regulations, treaties and international agreements, and the opinions of prominent legal scholars.

III. Discussion

Concept of the Rule of Law and Democracy

As a concept, law state⁹ and democracy,¹⁰ (and even the concept of a democratic rule of law itself) is not a static concept but a concept that is developing¹¹ and open to debate and renewal.¹² In these two concepts, the protection of the rights of citizens is intrudes, because the protection of human rights is an element in the ideals of the rule of law and the protection of citizens' rights is a manifestation of people's sovereignty which is an important element in the concept of democracy.

⁸ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif [Normative Legal Research, third printed]*, (Jakarta: Rajawali Pers, 1985), page 9-10.

⁹ By many experts the concept of the rule of law and democracy as "essentially contestable concept" because it is evaluative and relies on normative issues, disagreement. Fallon states that *The Rule of Law is a historic ideal and appeals to the Rule of Law remain rhetorically powerful. Yet the precise meaning of the Rule of Law is perhaps less clear than ever before. Many invocations are entirely conclusory, and some appear mutually inconsistent.* Richard H. Fallon, Jr. "The Rule of Law" as a Concept in Constitutional Discourse", *Columbia Law Review*, Vol. 97, No. 1 (Jan., 1997), pp. 1-2, 7. See also Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 *Law & Phil.* 137.

According to Tamanaha, *the rule of law* (the rule of law is that this universally popular notion is elusive —seemingly hard to pin down). Brian Z. Tamanaha "The History and Elements of The Rule of Law", *Singapore Journal of Legal Studies* [2012] 232–247.

¹⁰ Waldron, *Ibid*; David Collier, et.al "Essentially contested concepts: Debates and applications", *Journal of Political Ideologies* (October 2006), 11(3), 211–246

¹¹ *The Rule of law* as a dynamic concept, among others, contained in the Delhi Declaration 1959 which mentions "The concept of the Rule of Law is that the law is not static, but rather dynamic and evolving. The Rule of Law is not simply about enforcing rules, but also is aimed at preserving fundamental principles. Thus, the Rule of Law safeguards and advances not only the civil and political rights of the individual in a free society, but equally concerns the social, economic, educational, and cultural conditions for realising man's legitimate aspirations and dignity.". The International Congress of Jurists, "The Rule of Law in a Free Society", New Delhi, India 5th – 10th January 1959

¹² As an "essentially contestable concept", the concept of the rule of law and democracy is open, that is, subject to periodic improvements in new situations. Read David Collier, et.al., *Ibid*.

The idea of "essentially contestable concept" was introduced by W.B. Gallie in his writing 'Essentially contested concepts' in *Proceedings of the Aristotelian Society*, (56, 1956). According to W.B. Gallie, essentially contestable concept 'inevitably involve endless disputes about their proper uses on the part of their users'. Gallie offers seven criteria for identifying, understanding, and reasoning about "concepts", which are: (1) *their appraise character*, (2) *internal complexity*, (3) *diverse descriptibility*, (4) *openness*, (5) *reciprocal recognition of their contested character among contending parties*, (6) *an original exemplar that anchors conceptual meaning*, and (7) *progressive competition, through which greater coherence of conceptual usage can be achieved*. Read David Collier, et.al *loc.cit*.

The dynamic nature can be observed in space and time the concept of law state¹³ is implemented in historical trajectories. History records that the conception of law state has experienced developments and shifts. The concept of the state law can be observed from the emergence of the conception of a liberal rule of law (*liberale rechtsstaat*) with the teaching of the *nachwachter staat* (the state as a night watchman)¹⁴ shifted to a formal legal state (*formele rechtsstaat*) whose one of the thinkers was Friedrich Julius Stahl.¹⁵ Then the concept of the material state law (*materiele rechtsstaat*) was developed, which then emerged the welfare state (*welvarstaat*).¹⁶ Meanwhile, in the Anglo-Saxon tradition, the rule of law appears, which was introduced by A.V. Dicey¹⁷ in the British legal tradition which later developed in the United States with a different model.

The concept of the rule of law and the concept of democracy are different concepts but have similarities and harmony in providing protection for human rights and restrictions on power. The development of the modern state today, the principle of the rule of law (nomocracy) often coincides with the principle of democracy. The concept of the rule of law is not opposed to the concept of democracy. The two concepts (the rule of law and democracy) work together and support each other. Various definitions¹⁸ of the rule of law include democracy (in this case public participation) and human rights are

¹³ In Indonesia, the term the rule of law is often paired with the term rule of law, or *rechstaats* in Dutch. A number of Indonesian law scholars use the term rule of law as an equivalent of the rule of law. As a reading of the goal written by the legal scholars referred to, the author wants to mention: Ismail Suny, *Pergeseran Kekuasaan Eksekutif* ' [Shift of Executive Power] (Jakarta: Aksara Bam, cetakan keenam, 1986); Jimly Asshidiqie, *Gagasan Kedaulatan Rakyat dalam Konstitusi dan Pelaksanaannya di Indonesia* [The Idea of People's Sovereignty in the Constitution and Its Implementation in Indonesia] (Jakarta: PT Ichtiar Bam van Hoeve, 1994); Oemar Seno Adji, *Free Judicial State of Law* (Jakarta: Penerbit Erlangga, cetakan kadi } 1985); Todung Mulya Lubis, *In Search of Human Rights, Legal-Political Dilemmas of Indonesia 's New Order, 1966-1990* (Jakarta: PT Gramedia Pustaka Utama, 1993); dan Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia, Studi Sosio-Legal atas Konstituante 1956-1959* [Aspirations of Constitutional Government in Indonesia, Socio-Legal Study of the Constituent Assembly 1956-1959] (Jakarta: T Pustaka Utama Grafiti, 1995).

¹⁴ The notion of *Rechtsstaat* in the atmosphere of liberalism and capitalism grew in Europe around the 18th century, which was pioneered by Immanuel Kant who idealized the concept of *laissez faire laissez aller* and the idea of a night watch state (*nachwachtersstaat*). Jimly Asshiddiqie, *Agenda Pembangunan Hukum Nasioanal di Abad Globalisasi*, Cet. I [The Agenda for Developing National Law in the Globalization Century, First Print], (Jakarta: Balai Pustaka, 1998), p. 90.

¹⁵ According to Friedrich Julius Stahl, the elements in *Rechtsstaat*¹⁵ are (1) recognition of human rights (*grondrechten*), (2) separation of power (*scheiding van machten*), (3) government based on law (*wetmatigheid van het bestuur*), and (4) administrative justice (*administratieve rechtspraak*). Read Muhammad Tahir Azhary, *Negara Hukum: Suatu Studi tentang Prinsip-prinsipnya Dilihat dari Segi Hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini* [Rule of Law: A Study of Its Principles Judging from the Aspects of Islamic Law, Its Implementation in the Medina State Period and Today], Jakarta, Bulan Bintang, 1992, pp. 66-67.

¹⁶ Strong reaction against capitalism liberalism gave rise to the welfare state, Utrecht, called the modern rule of law. The conception of the material state law or modern rule of law state which developed then includes the notion of justice in it as the antithesis of the classical rule of law. E. Utrecht, *Pengantar Hukum Administrasi Negara Indonesia* [Introduction to Indonesian State Administrative Law]. Jakarta: Ichtiar. 1962, pp. 26-27.

¹⁷ A.V. Thinking Dicey as outlined in his book *Introduction to The Study of the Law of the Constitution*. Dicey said the important characteristics in every rule of law or called the rule of law, are: (1) Supremacy of law against arbitrary power, Dicey explained ... *the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government*); (2) The principle of equality of treatment (equality before the law). Dicey said ... *equality before the law, or equal subject to all classes to the ordinary law of the land administered by the ordinary law courts*), (3) Protection of human rights guaranteed by the constitution. ...*may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of constitutional code, are not the source but the consequence of the rights of individual, as defined and enforced by the courts*). A.V. Dicey, *Introduction to The Study of The Law of The Constitution*, Macmillan Press, London: 2005, pp. 197-198.

¹⁸ About the rule of law, according to Richard H. Fallon, is a contentious concept and there is no complete understanding. However according to Fallon, in general the concept of the rule of law has three main objectives, which are: (1) *the rule of law should protect against anarchy and the Hobbesian war of all against all*; (2) *the rule of law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions*, (3) *the rule of law should guarantee against at least some types of official arbitrariness*. Richard H. Fallon, Jr. "The Rule of Law" as a Concept in Constitutional Discourse", *Columbia Law Review*, Vol. 97, No. 1 (Jan. 1997), pp. 1-2, 7-8.

important elements in the rule of law. This can be observed from the United Nations definition, which states that the rule of law refers to:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁹

The concept of the rule of law has a history in the struggle to uphold democracy, therefore the concept of the rule of law and the concept of democracy are often used as a term, namely the concept of a democratic rule of law. This is due to the relationship between the supporting values of democracy and elements of the rule of law. That similarity makes one breath to mention the ideal form of the rule of law that protects the rights of citizens in a democratic rule of law term.²⁰ The democratic nature of the concept of the rule of law is shown through the understanding that law in a democratic state is determined by the people, which is nothing but the arrangement of relations between fellow people and the protection of the rights of citizens in the context of the relationship between the authorities and the people.²¹

In the perspective of democracy, the developing concept of constitutional democracy is a government which is limited by its power and is not allowed to act arbitrarily towards its citizens. These restrictions are set forth in the constitution. This concept is also known as "constitutional government".²² Regarding the Constitution, according to C. F. Strong, the constitution is a collection of principles governing and establishing power and government, rights governed, and the relationship between the two or between the government and the governed. The constitution is used to describe the whole system of state administration of a country, which is a collection of regulations that establish and regulate or determine government.²³ Constitutional democratic continues to develop in line with the development of human rights protection and the limitation of state power.

In this understanding, the concept of democratic constitutional and democratic rule of law contains an intersection of equality in terms of limiting state power and the protection of citizens. In relation to the operationalization of the concept of a democratic rule of law, no citizen is above the law and hence all citizens must obey the law.²⁴

As a consequence of the application of the principle of equality before the law, authoritarian and autocratic power must be excluded from the discourse of the rule of law, because both types of power are almost certain the exercise of government power is laden with the absence of legal certainty, independent

¹⁹ Report of the Secretary General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", UN SC, UN Doc. S/2004/616 at 4.

Compare with Brian Z. Tamanaha's opinion. The definition of the rule of law presented by the Secretary General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" was rejected by Brian Tamanaha who argues that democracy and human rights are not an important element in defining the rule of law.. According to Tamanaha, the simple and basic definition of the rule of law is "government officials and citizens are bound by and abide by the law". Tamanaha rejects democracy and human rights as important elements in defining the Rule of Law as in the definition of The Rule of Law in the Report of the Secretary General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies"; Read Brian Z. Tamanaha "The History and Elements of The Rule of Law", Singapore Journal of Legal Studies [2012] 232–247 .

²⁰ Arbi Sanit, Perwakilan Politik di Indonesia [Political Representative in Indonesia] (Jakarta: Penerbit CV Rajawali, 1985), p. 25.

²¹ Guellermo S. Santos, "The Rule of Law in Unconventional Warfare", Philippine Law Journal, Number 3 (July 1965), p. 455.

²² Miriam Budiardjo, Dasar-Dasar Ilmu Politik [Foundation of Politics Science], (Jakarta: Gramedia Pustaka Utama, 2005), 52-55.

²³ C. F. Strong, *Konstitusi-Konstitusi Politik Modern* [Modern Political Constitutions], Jakarta: Nuansa dan Nusamedia, 2004, pp. 9–11.

²⁴ Teofisto T. Guingona, "The Rule of Law and Democracy in the Philippines", Beatrice Gorawantschy, Beatrice Gorawantschy, et.al., Rule of Law and Democracy in Philippines (Diliman: University of Philippine, 1985) p. 15.

and impartial judiciary and failure of the application of judicial failure. the principle of equality before the law. This assertion is important to say, because governments with authoritarian and autocratic styles also claim to be the rule of law. Therefore, it is necessary to add the word "democratic" to the terminology of the rule of law.

A more operational discussion of the concept of a democratic rule of law is also related to the guarantee of an independent judicial power as embraced in the Anglo-Saxon legal tradition and *rechtsstaats*. The relationship between the separation of powers with the concept of the rule of law lies in the setting of the boundaries of the judicial, executive and legislative powers or the relationship between the branches of power in the constitution.²⁵ Another variant of the rule of law state can be seen from the view of Friedrich Julius Stahl,²⁶ namely elements of government based on regulations, in addition to elements of protection of human rights, division of power and state administrative justice.

In relation to the drafting of a Constitution, all elements of the democratic rule of law must be spelled out in the constitution. Placement of the constitution as the highest source of law in a country is an embodiment of the spirit of democracy. The constitution is then interpreted as a stronghold of democracy. Starting with the construction of such thinking, legal thinkers relate the teachings of democracy to the spirit of law or are often spoken in terms of the concept of a democratic rule of law (*democratische rechtsstaat*).

As a critical note, the ideal concept of the rule of law can only be operationalized in a democratic state, or in other words a democratic political system does provide an opportunity for the growth of a democratic legal system. The relation of the principle of equality before the law with the concept of the rule of law is so important that the term "rule of law" is emphasized with the addition of the word democratic, because only in a democratic rule of law the principle of equality before the law is applied.²⁷ The sharpening of the meaning has a historical basis, because for example in the days of Germany under the leadership of Adolf Hitler there was no equality before the law for the Jews, and even vice versa what happened was an arbitrary act (arbitrary). The absence of a fair, honest, and impartial judicial process during the time of Adolf Hitler occurred because there was no separation between the executive and legislative powers.

III.1. Citizens' Rights

Human rights are universal values that have been universally recognized. Various international instruments require participating countries to provide guarantees for the protection and fulfillment of citizens' rights. Indonesia is a law that has a long history in the struggle for the protection of human rights. As a democratic state of law, Indonesia has ratified various international legal instruments.²⁸ Fundamental changes in the politics of human rights enforcement after the 1998 reforms but cannot be separated from the long history of previous struggles.

²⁵ Dieter C. Umbach, "Basic Element of the Rule of Law in a Democratic Society, Beatrice Gorawantschy, et.al., Rule of Law and Democracy in Philippinense (Diliman: University of Philippine, 1985) p. 24.

²⁶ Oemar Seno Adji Peradilan Bebas Negara Hukum [Judicial Free State of Law] (Jakarta: Penerbit Airlangga, 1985) p. 16.

²⁷ W. Friedmann, *Legal Theory* (London: Stevens & Sons, fourth edition, 1960), 392.

²⁸ International Convention on the Political Rights of Women (Law Number 68 of 1958), International Convention on the Elimination all Forms Discrimination Against Women (Law Number 7 of 1984), International Convention on the Rights of Child (Presidential Decree Number 36 of 1990), International Convention against Apartheid in Sports (Presidential Decree Number 48 of 1993), International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Law Number 5 of 1998), International Convention on The Elimination of All Forms of Racial Discrimination (Law Number 29 of 1999), International Covenant on Economic, Social and Cultural Rights (Law Number 11 of 2005), International Covenant on Civil and Political Rights (Law Number 12 of 2005).

The 1945 Constitution reform has included guarantees of the protection and fulfillment of citizens' rights in the constitution. Some Articles in the 1945 Constitution of the Republic of Indonesia regulate comprehensively the rights of citizens as well as the obligations of the state. The regulation and implementation of citizens' rights and obligations of the state should be on two sides of a coin. Some of the articles that can be mentioned are as follows: Article 26 (residents and citizens), Article 27 (Guaranteed equality before the law and government), Article 29 (religious freedom), Article 30 (State defense), Article 31 (Education), and Article 32 (Regional culture).

A fundamental change in the amendments to the 1945 Constitution is a comprehensive regulation on guarantee of citizens' rights which is regulated in Article 28, Article 28A - Article 28J (detailed regulation of guarantees of citizens' rights).

- a) Article 28A: the right to life and the right to defend one's life and livelihood.
- b) Article 28B: (1) the right to form a family through legal marriages, (2) the right to continue descendants through legal marriages, (3) children's rights to survival, growth and development, and (4) children's rights to protection from violence and discrimination.
- c) Article 28C: (1) the right to develop themselves through the fulfillment of basic needs, (2) the right to education to improve the quality of life and for the well-being of humankind, (3) the right to benefit from science and technology, arts and culture, in order to improve quality of life and for the well-being of humanity, (4) the right to advance themselves in fighting for their collective rights to develop their society, nation and country.
- d) Article 28D: (1) the right to recognition, guarantees, protection and legal certainty that is fair and the same treatment before the law, (2) the right to work and to receive fair and fair compensation and treatment in an employment relationship. (3) the right to get equal opportunities in government. (4) the right to citizenship status.
- e) Article 28E: (1) the right to freedom of religion and worship, (2) the right to choose education and teaching, (3) the right to choose work, (4) the right to choose citizenship, (5) the right to choose a residence in the State and renounce it, and the right to return, (6) the right to freely believe in beliefs, express thoughts and attitudes, in accordance with his conscience, (7) the right to freedom of association, (8) the right to freedom of association, (9) the right to freedom of opinion.
- f) Article 28F: (1) the right to communicate and obtain information in order to develop his personal and social environment and, (2) the right to seek, obtain, possess, store, process and convey information using all types of available channels.
- g) Article 28G: (1) the right to protection of personal, family, honor, dignity, and property under his authority, (2) the right to security and protection from the threat of fear of doing or not doing something that is a human right, (3) the right to be free from torture and treatment which degrading human dignity; (4) the right to obtain political asylum from other countries.
- h) Article 28H: (1) the right to live in physical and spiritual well-being, (2) the right to live, (3) the right to a good and healthy environment, (4) the right to obtain health services, (5) to get special facilities and treatment for get the same opportunities and benefits in order to achieve equality and justice, (6) the right to social security that enables development as

a whole as a dignified human being, (7) the right to have private property rights and these rights should not be taken over arbitrarily – by anyone.

- i) Article 28I paragraph (1): human rights that cannot be reduced under any circumstances (1) the right to life, (2) the right not to be tortured, (3) the right to freedom of thought and conscience, (4) the right to religion, (5) the right not to be enslaved, (6) the right to be recognized as a person before the law, (7) the right not to be prosecuted on the basis of a retroactive law.
- j) Article 28I paragraph (2): (1) the right to be free from discriminatory treatment on any basis, (2) the right to get protection against discriminatory treatment.

The guarantee of protection and fulfillment of the rights of these citizens needs to be supported by government policies in implementing basic norms in the 1945 Constitution of the Republic of Indonesia. In addition to the obligations and duties of the government, as a democratic rule of law, Indonesian citizens must be given ample scope to participate to maintain and fulfillment of rights-only. One of the mechanisms built in the 1945 Constitution of the Republic of Indonesia is to examine the laws and regulations / administrative decisions that are considered to violate citizens' rights and contradict the 1945 Constitution. The mechanism through testing by the judicial authority is known as judicial review.

III.2. "Judicial Review"

In a democratic rule of law, people's involvement in decision making is crucial. Citizens do not only play a role in the decision-making process. People also have the right to exercise control over legal products made by legislators and executives. Against legal products and / or decisions and actions of state administrative bodies / officials. Citizens can be involved in executive review / preview, legislative review, and judicial review. In the executive review / preview, citizens' legislative review can be actively involved in providing input in the decision-making process. Not stopping there, citizens can also object to legal products and decisions / actions of state administrative officials.

Judicial review is a form of control of judicial power over legislative and executive power. Judicial review becomes an important pillar in the principle of separation of powers.²⁹ Hans Kelsen put the main idea of the concept of separation of powers in the judicial review of legislation.³⁰ Because, according to him, the material test of a law is an e-modern democracy. Kelsen sees the concept of separation of powers in terms of political organization.³¹ His opinion was related to the fact that the functions of the three branches of power referred to function were to perform public services, therefore there must be a line that clearly separates and divides the three. The three branches of power are also not permitted to be one more powerful than the other and must exercise their power based on established laws.

²⁹ The separation of powers between the three branches of power is seen as something absolute by Montesquieu. Regarding the legislative and executive separation, he said: "If the legislative and executive power is vested in one person or a judicial body, then there is no freedom because citizens will worry if the king or senate who makes tyranny laws will punish or rule them through tyranny."

Regarding the need to separate judicial power from other branches of state power, Montesquieu argued: "Freedom does not exist if judicial power is not separated from legislative and executive power. If judicial power is united with legislative power, then power over the life and freedom of citizens will be carried out arbitrarily because judges will become lawmakers. If this judicial power is united with executive power, then judges can become oppressors." Montesquieu, *Limiting Power, Study of the Soul of the Law* (original title *Lesprit des Lois*), J.R. Sunaryo (Trans.), Jakarta: PT Gramedia Pustaka Utama, 1993, pp. 51-52.

³⁰ Hans Kelsen, *Pure Theory of Law (Reine Rechtslehre)*, Max Knight (Trans.) (Berkeley: University of California Press, 1967), 290-299. See also Hans Kelsen, *General Theory of Law and State*, *Op.Cit.*, 269-282.

³¹ *Ibid.*, 269.

Judicial review can be carried out if there is a guarantee of judicial independence. Judicial review cannot be separated from independent judiciary because judicial review is one of the implementations of independent judiciary based on the *trias politica* doctrine. of law), where an independent and impartial judicial process is one of the requirements for the establishment of the rule of law.³²

An independent judicial process is understood as the absence of influence from third parties or other institutions outside the judicial power in the judicial process, where the judge's decision is born only on the basis of the correlation of the facts that appear in the trial and the relationship with applicable law.³³ There are two reasons that explain the importance of third-party neutrality to the judicial process.³⁴

First, the principle of neutrality of third parties is related to the application of court decisions. Ideally, when judges do not have an interest in a case and are not biased towards one of the litigants regardless of differences in economic background, the judges can apply the parties to an equal position before the law and are able to protect their rights. the rights and security of one party from infringement of the other party. Therefore, an independent judge is assumed to be able to decide on a case based on objective principles of law, not based on the social position or political position of the litigants. Such independent judges' attitudes will prevent parties who have a strong position in society from manipulating the law in their interests, just as every injured citizen can get remedies by bringing his case before an independent judge to get a fair and impartial legal process.

Second, the independence of the judiciary becomes very important when the government becomes a party in a dispute or case, because then the impartiality of the court is tested in handling the dispute. If the independence and impartiality of the judicial process can be trusted, the judges examining the dispute will not be biased in the interests of the government. That is why the importance of the position of judges is free from the grip of the influence of government power. They also need to be protected from all forms of threats, interventions and manipulations that encourage judges to issue decisions in favor of the authorities or they do not issue decisions that should be issued. In connection with the possibility of a bad independence for judges, the concept of the rule of law will not work if the law enforcement agency consists of judges who are afraid to challenge the interests of the government or have tended to justify government action.

The practice of judicial review itself has differences between one country and another. Even countries within a group of legal traditions are also different. Britain and the United States, for example, as countries with Anglo Saxon traditions, the two countries apply judicial review differently. The United States is a country that strongly implements a judicial review while the UK does not recognize judicial review/constitutional review in the sense of testing the law against the constitution because Britain adheres to the system of parliamentary sovereignty / supremacy of parliament.³⁵

³² There are five elements in the rule of law, which are more detailed: "(1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs; (2) The second element of the Rule of Law is efficacy, or the law should actually guide people; (3) The third element is stability, in which the law should be reasonably stable, in order to facilitate planning and coordinated action over time; (4) The fourth element of the Rule of Law is the supremacy of legal authority, meaning the law should rule officials, including, as well as ordinary people citizens; (5) The final element involves instrumentalities impartial justice, meaning courts should be available to enforce the law and should employ fair procedures." Read Richard H. Fallon, Jr., "The Rule of Law as a Concept in Constitutional Discourse," *Columbia Law Review*, Vol. 97 (January 1997), pp. 8-9.

³³ A.V. Christopher M. Larkins. "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *The American Journal of Comparative Law* 4, Vol. XLIV (Fall 1996), p. 608.

³⁴ *Ibid.*

³⁵ According to Dicey, the principle of parliamentary sovereignty only means that parliament, according to the British Constitution, has the right to make and invalidate any law and no person or body recognized by British law has the right to cancel or override parliamentary legislation. AV Dicey, *Introduction... op.cit.*, pp. 37-38; John Alder stated that *this has three separate aspects: (1) Parliament has unlimited lawmaking power in the sense that it can make any kind of law; (2) The legal validity of laws made by Parliament cannot be questioned by any*

Indonesia, after a long journey since preparation for independence, based on the 1945 Constitution implemented a judicial review. Constructions built in the 1945 Constitution are:

1) *Material Review in the Constitutional Court*

Citizens who have the quality of legal standing can file objections to the material content of the law which is considered to contradict the constitution through a constitutional review mechanism to the Constitutional Court. The authority of the Constitutional Court to conduct a judicial review is the attribution authority stipulated in Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which is then elaborated in Law No. 48 concerning Judicial Power³⁶ and Law Number 24 of 2003 concerning the Constitutional Court³⁷ as amended by Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court. Based on the 1945 Constitution of the Republic of Indonesia, the Constitutional Court has 4 (four) authorities and 1 (one) obligation. The Constitutional Court has the authority to adjudicate at the first and last level whose decisions are final to:

- a. Test the law against the 1945 Constitution of the Republic of Indonesia.
- b. Decide on a dispute over the authority of a state institution, the authority of which is granted by the 1945 Constitution of the Republic of Indonesia.
- c. Decide upon the dissolution of political parties, and
- d. Deciding upon disputes regarding the results of general elections.

The Constitutional Court is obliged to give a decision on the opinion of the DPR that the President and / or Vice President are suspected of:

1. Violating the law in the form of:
 - a) betrayal of the state;
 - b) corruption;
 - c) bribery;
 - d) other criminal offenses; or
2. despicable act, and / or
3. no longer qualifies as President and / or Vice President as referred to in the 1945 Constitution of the Republic of Indonesia.

2). *Material Review in Supreme Court*

Citizens who have the quality of legal standing can file objections to the content of the laws and regulations under the law which are considered to be contradictory to the laws and regulations through the mechanism of the right of judicial review to the Supreme Court.

In the legal system in Indonesia, judicially, the judicial review by the Supreme Court which is known by the right of judicial review is first recognized compared to the judicial review in the Constitutional Court. Law Number 14 of 1970 became the initial basis for the right of judicial review by the Supreme Court. Amendments to the 1945 Constitution then strengthen the authority of the Supreme

other body; (3) A parliament cannot bind a future parliament. John Alder, *Constitutional and Administrative Law*, NY: Palgrave Macmillan law Master, 2007, p. 199.

³⁶ Republik Indonesia, Undang-Undang tentang Kekuasaan Kehakiman [The Law on Judicial Power], Law Number 48 of 2004, LN RI of 2004 Number 2009 NOMOR 158, TLN RI Number 5076.

³⁷ Republik Indonesia, Undang-Undang tentang Mahkamah Konstitusi [The Law on Constitutional Court], Law Number 24 of 2003, LN of 2003 Number 98, TLN RI Number 4316.

Court in judicial review of the statutory provisions under the law because it contradicts the law (Article 24A paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Provisions of Article 24A paragraph (1) of the 1945 Constitution of the Republic of Indonesia Article 20 paragraph (2) letter b of Law No. 48 concerning Judicial Power and Law on the Supreme Court (Law No. 5 of 1985³⁸ as amended by Law Number 5 of 2004³⁹ and Law No. 3 of 2009).⁴⁰

Conclusion

The protection of citizens' rights has been a serious discussion since the preparations for Indonesian independence, namely when the nation's fathers discussed incorporating human rights protection rules into the 1945 Constitution, with two extreme views. First, Sukarno - who later became the First President of the Republic of Indonesia - and professor of law, Professor Soepomo, refused to include the issue of human rights in the 1945 Constitution, because according to them the state as the "head of the family" for its people must provide protection to its citizens without having to rules of protection of citizens in the constitution. Secondly, Mohammad Hatta - who later became Vice President - and Professor Muhammad Yamin argued that it was important to include the protection of citizens' rights in the constitution so that there was legal certainty. Protection of the rights of citizens achieved momentum when an amendment to the 1945 Constitution was held.

The anxiety of Mohammad Hatta and Yamin was proven later in the era of Sukarno's Guided Democracy and Suharto's New Order, namely a massive violation of human rights. In the second era of government, there were violations of citizens' rights, both in terms of political rights in the form of freedom of association and political rights in the form of freedom to choose national leaders in a general election. Sukarno had even been named President for life through an unconstitutional legal process in the Provisional People's Consultative Assembly. Suharto became Indonesia's second President and was a leader for 32 years before resigning on May 21, 1998 amid months of anti-government demonstrations.

The wave of reforms in 1998 re-ignited the idea of regulating citizens' rights in the Constitution and a strong desire of the people to enjoy a democratic constitutional life based on law. One of the important changes in the 1945 Amendment (the 1945 Constitution of the Republic of Indonesia) is that the regulation of citizens' rights is more comprehensive than the 1945 constitution (pre-amendment) which regulates in general and concise terms. In addition to regulating the rights of citizens in the constitution, the amendment to the 1945 Constitution also introduces a judicial review institution as an effort to reject legislation that conflicts with human rights. Law products that are undemocratic and unconstitutional may no longer repeat the emergence of the practice of state administration with authoritarian and undemocratic state power. Judicial review in the Constitutional Court will avoid the presence of unconstitutional law products, especially those that conflict with the rights of citizens. And likewise, the Judicial review in the Supreme Court will prevent the presence of muzzle law products that conflict with the rights of citizens.

³⁸ Republik Indonesia, *Undang-undang tentang Mahkamah Agung [Law on Supreme Court]*, Law Number 14 of 1985, LN of 1985 Number 73, TLN Number 3316.

³⁹ Republik Indonesia, *Undang-Undang tentang Perubahan Atas UU No. 14 Tahun 1985 Tentang Mahkamah Agung [Law concerning Amendment to Law No. 14 of 1985 concerning the Supreme Court]*, Law Number 5 of 2004, LN RI of 2004 Number 9, TLN RI Number 4359

⁴⁰ Republik Indonesia, *Undang-Undang tentang Perubahan Kedua Atas UU No. 14 Tahun 1985 Tentang Mahkamah Agung [Law on the Second Amendment to Law No. 14 of 1985 concerning the Supreme Court]*, Law Number 3 of 2009, LN RI of 2004 Number 3, TLN RI Number 4958.

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